

**Statement**  
on  
**The Year 2000 Computer Problem**  
to the  
United States Senate  
Committee on Commerce, Science and Technology  
for the  
U.S. Chamber of Commerce  
and  
U.S. Chamber Institute for Legal Reform  
by  
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## Introduction

Good morning, Mr. Chairman and members of the committee. I am Thomas J. Donohue, President and Chief Executive Officer of the United States Chamber of Commerce and Chief Executive Officer of the U.S. Chamber Institute for Legal Reform. The U.S. Chamber is the world's largest business federation, representing more than three million businesses and professional organizations of every size, in every business sector, and in every region of the country. The central mission of the Chamber is zealously representing the interests of its members before Congress, the Administration, the independent agencies of the federal government, and the federal courts. The mission of the Institute for Legal Reform is to reform the nation's state and Federal civil justice systems to make them more predictable, fairer and more efficient while maintaining access to our courts for legitimate lawsuits.

Given the diversity of our membership, the U.S. Chamber of Commerce is well qualified to testify on this important topic. We are particularly cognizant of the problems that small businesses may face as the Year 2000 approaches because more than 96 percent of our members are small businesses with 100 or fewer employees and 71 percent have 10 or fewer employees. I welcome this opportunity to testify before you on the critical issue of Year 2000 (Y2K) reform and the urgent need for prompt action by Congress.

I would also like to point out that I appear before this committee under a unique distinction: I am here representing the interests of both potential Y2K plaintiffs and defendants. Certainly under these conditions, you can appreciate the challenge at hand to bring about effective Y2K reform and yet preserve the interests of those whom I represent.

I want to take a moment to recognize the tremendous work of Chairman John McCain and this committee on the Y2K issue. This hearing and your legislative efforts are

critical as we all seek to move quickly to address the Y2K problem. I also want to express my appreciation for the leadership and commitment to the Y2K issue by Chairman Orrin Hatch of the Judiciary Committee, Chairman Kit Bond of the Small Business Committee and Co-Chairmen Robert Bennett and Christopher Dodd and the Senate Special Committee on the Year 2000 Technology Problem. All of us owe you a great debt of gratitude for your efforts to work with us to address the Y2K problem quickly, fairly and in a bipartisan manner.

During the next year, the world community will face the possibility of a very serious threat to the global economy caused by the transition of computing systems to Y2K compatibility. This is a challenge not only to our technical ingenuity, but also to the public's faith in our leading technology industries, the American business community, and government in general and our legal system.

And the United States is not alone. All around the world, leaders are grappling with addressing the Y2K problem and its impact on their economies. This is particularly daunting given the U.S. leadership in the global economy and the implications due to our relationship with our trading partners abroad.

#### The Y2K Problem

The Year 2000 computer problem started decades ago when, in an effort to conserve memory and time as well as to be cost-effective, programmers designed software that recognized only the last two digits of dates. Thus, when "00" is entered for the Year 2000, a computer may process the date as the year 1900. This can cause the computer to produce erroneous data or to stop operating, both of which have far-reaching implications.

No one knows for certain what the scope of the problem may be. However, our economy is critically dependent on the free-flow of information. If this flow is disrupted or halted, our nation's economy could be seriously damaged. Indeed, the Federal Reserve

Bank of Philadelphia recently predicted that while the Year 2000 computer problem may boost the gross domestic product in 1999 by 0.1 percent, or \$8 billion, due to the massive influx of resources to fix the problem, in 2000, however, the problem could shrink GDP by 0.3 percent due to Y2K disruptions. In fact, some estimates are that that the Year 2000 computer problem could cost an estimated \$119 billion in lost output between now and 2001.

What will be the final impact of the Y2K problem on our economy is unknown. But we do know that it poses a very real and serious threat.

#### Business is Awareness and Commitment to Solve the Problem

To that end, American businesses have committed hundreds of billions of dollars and the extraordinary intellectual resources of its employees to meet the challenges we face as computer systems make the transition to Year 2000 compatibility. From laboratories to offices to other workplaces throughout the country, businesses are working diligently to ensure that America is prepared to address the challenges of the new millenium with as little disruption as possible to our economy and every day lives. This will be a tough and costly challenge. The Gartner Group, a technology consulting firm, estimates that software remediation alone will cost between \$300 and \$600 billion. This amount does not include the cost of repairing other factors, such as hardware, end-user software, embedded systems or litigation. According to the Cap Gemini Millennium Index released on November 10, 1998, major Western economies have made progress in addressing the Y2K problem. Year 2000 spending nearly doubled in the six months before the report, and climbed 93 percent from \$256 billion in April to \$494 billion by October. Projected cost estimates for software, hardware and labor expenses increased 20 percent from \$719 billion to \$858 billion. Furthermore, as of November 1, 1998, U.S. firms had expended 61 percent of their estimated Y2K budgets.

While businesses are working diligently, cooperatively and responsibly to meet this challenge, we must still acknowledge and prepare for the likely possibility that some problems may occur. Unfortunately, even under best-case scenarios, we will not be able to find and fix every single Y2K problem. This includes the Federal government as well. In fact, the General Accounting Office (GAO) reported recently that the Federal government is having difficulty in meeting a March 31, 1999 deadline to find, fix and test all of its computer systems. Only 11 departments were given satisfactory progress ratings, seven were making slow progress and seven more were making unsatisfactory progress.

But even if we fix most of the computer system problems, the Y2K problem is still expected to cause some disruptions. Some problems will not be fixed because of technical difficulties, some because of not starting soon enough, and some because of indifference.

#### Concerns about Litigation

The true tragedy, however, is that some problems will not be fixed because of a fear of litigation or the transfer of resources from actually fixing the problem to defending lawsuits. While business is working to fix the problem, there are those in our society who are planning to exploit it. Unless steps are taken soon, we could experience an explosion in litigation. In fact, Giga Information Group, a technology-consulting firm, has estimated that the amount of litigation associated with Y2K will be \$2 to \$3 for every dollar spent actually fixing the problem. If this is allowed to proceed, guess who will bear the cost? It will ultimately be consumers. Obviously, this scenario would be a monumental tragedy for American businesses, workers and consumers.

Business has good reason to be concerned. A report from the Newhouse News Service quoted a participant in the American Bar Association's most recent annual convention as describing Y2K as "the bug that finally provides lawyers the opportunity to rule the world." In addition, at a seminar held at the ABA's convention, a team of lawyers estimated that the amount of legal costs associated with Y2K could exceed all the money spent on asbestos, breast implants, tobacco and Superfund litigation combined.

Clearly, America has a choice. It can adopt a legal environment that encourages the sharing of information, the fixing of the problem, and the fast, fair and predictable resolution of legitimate claims for compensation. Or, it can allow a potential litigation explosion that could be very costly to American consumers. Just think of the impact this would have on our economy, job creation and maintenance, and the average American family. Can we run the risk of quashing those historic years of economic expansion with the lowest unemployment rate in three decades? Mr. Chairman and members of the Committee, this is a very real scenario and a very serious challenge that we have before us.

#### Business' Recommendations

But something can be done. The business community and other organizations have worked together to fashion a consensus proposal that directly addresses the Y2K problem. This proposal would encourage remediation, preclude exploitive and costly litigation while continuing to allow those with legitimate claims access to our legal system in addition to giving the courts the means to efficiently resolve Y2K-related disputes. In developing this proposal, we were deliberately inclusive of all interests and required compromise and concessions from all the participants.

The coalition represents a cross-spectrum of various industries and interests. It includes the U.S. Chamber of Commerce, the National Association of Manufacturers, the National Retail Federation, the National Federation of Independent Business, the National Association of Wholesalers and Distributors, the Edison Electric Institute, the American Insurance Association, the International Mass Retail Association, among many others. It is important to note that some members of this coalition represent both potential plaintiffs and defendants in Y2K-related litigation.

Passage of the coalition's proposal would accomplish several things. It would encourage remediation and minimize costs, thereby protecting the economy, jobs,

taxpayers and consumers. Our national infrastructure and national security would also benefit.

Before turning to the specifics of what this proposal will do, it is important for me to emphasize what it will not do. This proposal will not alter the rights of persons who are physically injured or otherwise truly harmed by a Y2K failure. The proposal specifically excludes from its purview claims for personal injury. It allows those who experience harm because of a Y2K problem to have access to the legal system and to be fully compensated for their real losses.

Over the past five years, most large and mid-size American companies have taken steps to address their Y2K problems. The anecdotal reports we are receiving indicate that the computer systems of most of these companies will be Y2K compliant and that during the next few months most of them will be testing their systems and preparing for January 1, 2000. Much work, however, must still be done—especially in the small business community.

The consensus proposal is supported by large, mid-size and small businesses because it will both help and encourage them to address their Y2K problems. By passing the proposal in the remaining months of 1999:

- Business and consumers will be encouraged to fix their Y2K problems because they will not be compensated for damages they could reasonably have avoided;

- Businesses will be encouraged to make efforts to fix Y2K problems because those efforts will be made admissible in contract cases and would be an absolute defense in non-personal injury tort actions; and

- Consultants and other solution providers will know that the terms of their contracts will not be altered if Y2K problems occur, so they will have a greater incentive to take on additional Y2K remediation work.

If Y2K problems begin to materialize, the proposal encourages both potential

claimants and potential defendants to resolve their disputes without burdening the court system with expensive litigation:

Before suing, potential plaintiffs will be required to give potential defendants an opportunity to fix the Y2K problem by giving written notice outlining their Y2K problem. The potential defendants would then have 30 days to provide a written response to this notice describing what actions they have taken or will take to fix the problem. If not satisfied with the response, potential plaintiffs may initiate a lawsuit 60 days after the receipt of the potential defendants' response. This provision will accelerate the remediation process if failures occur, eliminating the need for most lawsuits and preventing the diversion of precious time and resources from remediation to litigation.

The proposal also encourages parties to resolve their Y2K disputes through voluntary alternative dispute resolution mechanisms.

An important aid in discouraging litigation and encouraging settlement is a set of "ground rules" which ensures fairness to both parties and brings some certainty and predictability to the process. It is important to remember that our proposal does not cover claims for personal injury. Some of the essential points of the proposal are:

It ensures that the terms contained in written contracts are fully enforceable except in cases where a court finds that the contract, as a whole, is unenforceable.

To minimize the "lottery" aspect of litigation surrounding Y2K, the imposition of punitive damages is limited. Any punitive damages that can be assessed against a defendant are limited to the greater of three times actual damages or \$250,000, or for small companies (those with



less than 25 employees), to the lesser of three times actual damages or \$250,000.

In tort actions, each defendant will only be liable for the amount of damage in direct proportion to the defendant's responsibility. This provision is modeled on the Private Securities Litigation Reform Act of 1995.

If Y2K failures lead to disputes that cannot be resolved without litigation, the proposal provides additional procedural and substantive rules that small and large plaintiffs and defendants in the business community believe are fair and will promote efficiency. This includes expansion of Federal class jurisdiction for Y2K class actions and no strict liability for a Y2K problem.

I must restate that the proposal does not alter a plaintiff's right to recover actual or consequential damages, bring claims for personal injury, nor does it unduly burden a plaintiff's access to the courts. In other words, the ability of any plaintiff to be made whole from losses resulting from a Y2K failure is not altered.

Finally, we believe that the likelihood of frivolous litigation should be reduced by placing reasonable limits on the fees that attorneys stand to gain from this problem that threatens our national economy and national security. This proposal includes a provision requiring that an attorney in a Year 2000 action cannot earn a contingency fee greater than the lesser of the attorney's hourly billings (not to exceed \$1000 per hour) or an agreed upon percentage of the total recovery. The presiding judge in a class action will determine, at the outset of the lawsuit, the appropriate hourly rate (not to exceed \$1000 per hour) and the maximum percentage of the recovery (not to exceed 40 percent) to be paid in attorneys fees. This provision would serve to both fairly compensate an attorney who takes on a meritorious claim while reducing the incentives for frivolous, speculative and exploitive litigation.

### Conclusion

Unlike other national emergencies that hit without any warning, we now have an

opportunity to directly address the Y2K problem before it hits. The business community is willing to do its part in fixing the Y2K problem, and to compensate those who have suffered legitimate harms. All that we ask is that Congress, the Administration and the courts work with us to ensure that our precious resources are not squandered and that our focus will be on avoiding disruptions. We look forward to working with you, the full Congress, and the Administration to pass a common-sense proposal for Y2K reform.

Mr. Chairman, I ask that the accompanying documents prepared by the U.S. Chamber of Commerce be included in the record with my statement.